SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1063

THRIFT DRUG, A DIVISION OF J.C. PENNEY COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THRIFT DRUG, A DIVISION OF J.C. PENNEY COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Thrift Drug, a Division of J.C. Penney Company, Inc., (hereinafter the "Petitioner" or "Employer"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 6, 1975.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported. It is annexed as Appendix A, pp. 1a-3a.[1] The decision and order of the National Labor Relations Board (hereinafter "the Board") is reported at 215 NLRB No. 51 (App. C, pp. 6a-17a).

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[1] The various appendices will be cited subsequently as "App. —, pp. —."

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Is the decision of the United States Court of Appeals for the Fifth Circuit, which found that the Union's waiver of $350 in initiation fees and assessments did not interfere with the free choice of the eligible voters, inconsistent with the decision of this Court in *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973)?

2. Did the Fifth Circuit err by sanctioning, in summary fashion, the Board's consistent and repeated refusal even to consider whether a fee waiver of the magnitude involved herein could have interfered the reasoned choice of eligible voters?

3. Should this Court resolve the conflict between the decision of the United States Court of Appeals for the Sixth Circuit in *NLRB* v. *Gilmore Industries*, 341 F.2d 240 (6th Cir. 1965), and the decision of the Fifth Circuit in the instant matter?

4. Has the Fifth Circuit denied fundamental due process by failing to order an evidentiary hearing, despite the existence of substantial and material factual issues which mandated such a hearing—such as the question of the impact of the fee waiver on the eligible voters and the question of the amount of fees usually assessed by the Union—and despite Petitioner's steadfast and earnest request for such a hearing at every stage of these proceedings?

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* (hereinafter "the Act"), are annexed (App. D, p. 18a).

Statement of the Case

This case presents a question not directly addressed in this Court's decision in *Savair*, which is critical to the administration of the Act; i.e., whether a union's waiver of initiation fees and assessments, because of the enormity of the amounts involved, can, standing alone, so impede the reasoned choice of eligible voters as to taint a representation election.

On April 6, 1973, the Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO (hereinafter "Local 1058" or "the Union") filed a petition for a representation election at a warehouse in Pittsburgh operated by the Petitioner. On August 8, 1973, after a representation hearing, the Regional Director for the Sixth Region of the National Labor Relations Board directed an election in a unit of Petitioner's warehouse employees.

Several weeks prior to the election, the costs of union membership were placed in issue before the eligible voters. Specifically, on August 10th and 16th, the Employer advised the employees that union membership entailed such financial obligations as initiation fees, dues, and other fees and assessments, informing them of Local 1058's policy of collecting as much as $420 in fees and hourly assessments from its members during the first year of their member-

ship.[2] On the following day, the Union announced to all of the eligible voters that it was waiving fees and assessments valued at $350.

> "This letter is to certify (in writing) that after LOCAL UNION No. 1058 wins the NLRB election . . . the only expense to you will be the normal six dollars a month dues. There will be no initiation fees, assessments or fines." (App. F, p. 23a).

This certification was signed by both the President and the Business Manager of Local 1058.

In a letter dated August 22nd, just two weeks prior to the election, the Union reaffirmed that it was waiving all fees and assessments except the monthly dues:

> "Your only cost . . . is a six dollar monthly dues."

The Union also enclosed a copy of the August 17th certification with this letter.[3]

The representation election was conducted on September 7, 1973. Of approximately 119 eligible voters, 106 ballots were cast, with 52 for unionization, 27 opposed and 27 challenges. On September 12, the Employer timely filed objections to the election, alleging, *inter alia*, that the Union had offered improper financial inducements to influence eligible voters to cast their votes for the Union.

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[2] Copies of the literature in which the amounts of these fees and assessments were set forth are annexed (App. E, pp. 19a-22a). The figure of $420 was arrived at as follows: The $.10 hourly assessment charged to members in the Pittsburgh area had a minimum yearly cost of $208. This, plus $150 in initiation fees and $72 in dues equals a first year liability of at least $420.

[3] It is undisputed, and the Fifth Circuit so found, that the value of the Union's waiver was $350 (App. A, pp. 2a-3a).

On December 12, 1973, the Regional Director issued a Supplemental Decision in which he overruled the Employer's objections and directed a hearing for the sole purpose of resolving the challenges to the ballots.[4] On December 17, 1973, this Court issued its decision in *Savair*. On December 28, 1973, the Employer filed with the Board a Request for Review and Motion for Reconsideration of the Regional Director's Supplemental Decision, specifically requesting that the Regional Director be directed to reconsider his decision in light of the Supreme Court decision in *Savair*.

On February 12, 1974, the Board, in a one-half page telegram, summarily denied the Employer's request and motion, wholly relying upon the Regional Director's pre-*Savair* analysis (App. H, p. 29a). Thereafter, certain of the challenges were resolved and a revised tally was issued showing 53 votes for the Union, 34 against, 16 challenges, and one void ballot.[5] The Union was certified on March 28, 1974.

On May 15, 1974, the Union filed charges alleging that the Employer refused to bargain with the Union as required by §8(a)(1) and (5) of the Act. A Complaint and Notice of Hearing was issued by the Regional Director acting on behalf of the Board's General Counsel. Petitioner joined issue, denying certain of the allegations and setting forth, *inter alia*, the following affirmative defenses:

1. The "Board did not conduct a lawful and proper representation election as required under the Act,

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[4] The pertinent portion of the Regional Director's Supplemental Decision is annexed (App. G, pp. 27a-28a).

[5] Thus, out of the 103 valid votes counted in the revised tally, the Union's 53 votes constituted just one more vote than the required majority.

and therefore a valid certification was not issued by the Board."

2. The "Board issued an invalid certification inasmuch as [the Union] offered unlawful financial inducements and bribes to eligible voters, and the Board, notwithstanding this improper conduct, refused to set aside the election."

On May 27, 1974, General Counsel moved for summary judgment. On December 4, 1974, this motion was granted by the Board, which again relied on the Regional Director's pre-*Savair* analysis and ordered the Employer to bargain with the Union.

Thereafter, the Employer petitioned the United States Court of Appeals for the Fifth Circuit to review and set aside the Board's order, and the Board cross-petitioned for enforcement.

On October 15, 1975, the Fifth Circuit issued a per curiam decision granting enforcement of the Board's order. The Fifth Circuit found that the Union had waived $350 in fees, but held that the waiver was lawful because "the Union's waiver of about $350 of fees for each employee in the present case was unconditional . . ." The Court thus narrowly limited *Savair* to situations involving waivers conditioned upon the signing of authorization cards and failed to give consideration to the actual impact of the instant waiver. (App. A, pp. 1a-3a). Judgment was entered on November 6, 1975 (App. B, pp. 4a-5a).

Reasons for Granting the Writ

1. *The decision below is contrary to the rationale of this Court's decision in Savair.*

a. *Savair* held that union fee waivers can interfere with Section 7 rights.

In *Savair*, this Court held that a union unlawfully interfered with employees' Section 7 rights to refrain from union activities by offering to waive its $10 initiation fee for those employees who signed union authorization cards prior to a representation election. In refusing to sanction the Board's approval of such a fee waiver, this Court stated:

> "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. . . . The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union. . . ." 414 U.S. at 278, 280.

In holding the *Savair* fee waiver to be impermissible, the Court recognized such waivers for what they are—economic inducements. Citing *NLRB* v. *Exchange Parts*, 375 U.S. 405 (1964), the Court found the *Savair* situation analogous to the objectionable conduct of "an employer who promises to increase fringe benefits by $10 for each employee who votes against the union." 414 U.S. at 278. Thus, this Court recognized that financial inducements may be improper, whether offered by a union or by an employer, and that such inducements should be carefully scrutinized and kept within permissible bounds.

b. The decision below ignores the *Savair* rationale.

In its per curiam decision, the Fifth Circuit Court of Appeals ignored the principles underlying *Savair*. Rather than consider the impact of the huge economic inducement upon the eligible voters, the Fifth Circuit mechanically sanctioned the Board's narrow reading of *Savair*. In the view of both the Fifth Circuit and the Board, *Savair* stands only for the proposition that conditional fee waivers are improper. Both tribunals wholly ignored this Court's thorough analysis of the impact of fee waivers and of other similar economic inducements.

It is respectfully submitted that *Savair* requires close scrutiny of all economic inducements offered to eligible voters prior to a representation election. The *Savair* rationale does not permit a fee waiver of $350 to be declared proper simply because it was not conditioned upon the signing of union authorization cards. In order that the Fifth Circuit's decision comport with *Savair*, the impact of the instant fee waivers must be carefully examined to determine if they impeded the reasoned choice of eligible voters.

c. The huge waiver of fees rendered a reasoned choice in the election impossible.

It is undisputed that Local 1058 eliminated long-established fees normally imposed upon new members in order to influence the outcome of the election. Moreover, the Union waived hourly assessments valued at a minimum of $208 per year, bringing the "total package" for employees to $350. Surely this outright attempt to buy support was not sanctioned by this Court in its *Savair* decision. Nor can the Fifth Circuit's upholding of the waiver be justified by the traditional argument that initiation fees are artificially imposed barriers with which

BLEED THROUGH

unions are at liberty to dispense.[6] This case involves much more. It involves a waiver of traditional ongoing obligations of membership in the Laborers' Union in order to create the impression in the minds of the eligible voters that they were to be the recipients of an offer too good to be passed up: the benefits of representation by the Laborers' without the traditional costs of such representation. It is difficult to regard this offer as anything less than a bribe which could not have been disregarded by the eligible voters.

There is no significant difference between the waiver in this case and the impermissible gifts discussed in the *Savair* decision, the latter involving free life insurance, gift certificates, or fees to attend union meetings,[7] except that the instant waiver constitutes a larger bribe and therefore a greater inducement to vote for the Union. The similarity between a waiver and such gifts has also been recognized by the First Circuit in *NLRB* v. *Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (1st Cir. 1964):

> "[S]ince a penny saved is a penny earned we have difficulty in seeing why a $10 bribe to join the union is septic . . . while a promise to waive a 'regular' $25 initiation fee is benign because there is a contingency." 328 F.2d at 681.

An employee who receives a waiver offer will have no difficulty in determining that the union is, in effect, putting money in his pocket. As the First Circuit stated:

> "We do not quarrel with the finding that giving an employee a glass of beer is not an unfair labor practice . . . but initiation fees are dollars, and their

[6] See *Savair, supra,* at 274, n.4.

[7] 414 U.S. at 279, n.6.

> significance in this case is attested by the prominence the Union gave to the matter." *NLRB* v. *Gorbea, Perez & Morell, S. en C.*, 300 F.2d 886, 888 (1st Cir. 1962).

That Local 1058 recognized the value of the waiver as a "vote-getter" is evident from the Union's repetition of its offer prior to the election (App. F, p. 26a). Obviously, such a large economic inducement had an impact upon eligible voters, but, as noted, no effort was made to ascertain just how great an impact. Not once during these proceedings, either before Region Six, the Board or even the Fifth Circuit, has this issue been addressed. The Union has been permitted successfully to offer what is in reality a bribe of considerable proportions without ever having either its motives or the impact of the waiver investigated. We submit that this unthinking certification is inconsistent with the *Savair* rationale, and it should not be given this Court's imprimatur.[8]

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[8] It is interesting to note that the dissenting opinion of Justice White (joined by Justices Brennan and Blackmun) in *Savair*, recognized that the waiver of an initiation fee may not be a permissible organizing tool where large amounts are involved. Justice White repeatedly referred to the small initiation fee ($10.00) involved in *Savair*, stating:

> "Since the . . . costs and benefits is marginal where a *small fee* is involved, the issue here resolves into the proper allocation of institutional responsibility between an administrative agency and a reviewing court." 414 U.S. at 289. (Emphasis added).
>
> • • •
>
> "[T]he decision of the union to waive *small fees* was not coercive. . . . I, therefore, respectfully dissent." *Id.* at 290. (emphasis added).

Even the "pre-*Savair* cases" of *NLRB* v. *Crest Leather Mfg. Corp.*, 414 F.2d 421 (5th Cir. 1969) and *NLRB* v. *DIT-MCO*, 420 F.2d 775 (8th Cir. 1970), upholding fee waivers, involved only the small fee waivers of $2.00 to $10.00, and $15.00, respectively, a long way from the $350 involved here.

2. *The decision below is in direct conflict with the decision of the United States Court of Appeals for the Sixth Circuit in NLRB v. Gilmore Industries.*

Counsel is aware of only one case which has involved a fee waiver comparable to that involved here. In that case, *NLRB* v. *Gilmore Industries, supra,* the Sixth Circuit Court of Appeals reached a decision opposite to that reached by the Fifth Circuit in the instant matter.

Gilmore involved facts strikingly similar to those involved here. In that case, in order to counteract a rumor in the plant that the union intended to charge an initiation fee of $300, the union waived its initiation fee. Rather than indicate precisely what its fee was, the union, as the Laborers' did here, simply announced that it was waiving its fee. The union then won the election and the employer filed timely objections.

The Regional Director set aside the election, but the Board, in a 3-2 vote[9] reversed and certified the election results. Gilmore then refused to bargain, and the Board, again in a 3-2 vote, found Gilmore guilty of an unfair labor practice under §8(a)(5) and (1). 143 NLRB 781 (1963).

The Sixth Circuit reversed. Relying upon the fact that the Gilmore employees could reasonably have concluded that a fee of $300 had been waived, the Court made it clear that by leading the employees to believe that such a large waiver was being made, the union had offered a substantial economic inducement which constituted an undue influence on eligible voters:

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[9] The dissenting Board members stated: "The proffered waiver . . . constituted a clear promise of benefit calculated to induce employees to vote for union representation and tended to interfere with the free choice of the employees." *Gilmore Industries,* 140 NLRB 99, 102-03 (1962) (Members Rodgers and Leedom dissenting).

> "In determining whether there was an interference with the employees' freedom of choice, we cannot detach the waiver of initiation fees from the circumstances under which it was made. We must consider all of the relevant facts and circumstances of the case. We conclude that the economic inducement offered by the union was material and impeded a reasoned choice." 341 F.2d at 242.

In the instant matter, Thrift employees were led to believe that they were receiving an even larger waiver than the Gilmore employees. Moreover, like the Union in *Gilmore*, Local 1058 was responding to initiation fee information which had already been introduced into the campaign.

Thus, the Fifth Circuit's sanctioning of a union waiver of fees and assessments valued at $350 is in direct conflict with the decision of the Sixth Circuit in *Gilmore*. The Fifth Circuit failed to deal with *Gilmore*, and it did not cite judicial support for its decision except its own narrow analysis of *Savair*. It merely ruled that there were "no additional 'circumstances' " warranting reversal of the Board.

Petitioner respectfully submits that the view of the Sixth Circuit is the correct one, and it requests this Court to resolve the conflict between the Circuits by granting review in this matter.[10]

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[10] Petitioner urges that the Board's purported "expertise" in this area should not be given controlling weight, since the Board has long vacillated on the question of whether waivers can constitute improper economic inducement. See, i.e., *Lobue Bros.*, 109 NLRB 1182 (1954) and *DIT-MCO, Inc.*, 163 NLRB 1019 (1967). Of course, as discussed above, the Supreme Court rejected the Board's view in *Savair*. Despite this, however, in this case the Regional Director and the Board relied upon reasoning specifically rejected by this Court in *Savair*. (See excerpt from Petitioner's Brief to the Fifth Circuit in this matter, which is annexed (App. I, pp. 30a-33a)).

3. *The failure of the Fifth Circuit Court of Appeals to grant an evidentiary hearing was an abuse of discretion and constitutes a denial of fundamental due process.*

In *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9 (1943), this Court recognized the importance of permitting parties before the Board properly to present their evidence before a decision affecting their rights was rendered:

> "The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case had been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." 318 U.S. at 28.

Petitioner has earnestly sought an evidentiary hearing in this matter throughout these proceedings. A request for such a hearing was first made during the Regional Director's administrative investigation[11] and has been renewed at every stage of the proceedings. Petitioner respectfully submits that the refusal to grant such a hearing, despite the existence of material and substantial factual issues, was an abuse of discretion and a denial of due process.

a. Petitioner's election objections raised material issues of fact which properly can be resolved only at an evidentiary hearing.

While Petitioner contends that the Union's waiver of $350 in fees justifies, as a matter of law, reversal of the Fifth Circuit's decision with directions to set aside the

[11] See, e.g., excerpts from Petitioner's letter of November 1, 1973 (App. J, pp. 34a-35a).

Board's certification, it alternatively submits that the Union's conduct raised numerous factual issues, which, at a minimum, necessitate a hearing.

As discussed above, in assessing the impact of the Union's conduct, it should be determined whether the waiver had the tendency to influence eligible voters. A hearing would provide an opportunity to receive evidence on *employee impact;* e.g., how many employees were aware of the waiver, what they knew about the nature and scope of the fees involved, and to what extent employees considered the waiver prior to the election. In addition, evidence could be adduced at a hearing as to the facts underlying the waiver; e.g., what were the Union's practices with regard to the collection of fees and hourly assessments, precisely what amounts were involved,[12] how did the Union distribute its waiver and what did its representatives say to employees concerning the financial inducements.

A hearing would also provide the Employer with an opportunity to present testimony which would establish (1) that the employees were aware of the substantial financial inducements the Union was offering, and (2) that the Union's waiver greatly influenced their votes because of

[12] It is conceivable that Local 1058's broad waiver may have misled the employees as to the amount of money involved. For example, in *NLRB* v. *Gorbea, Perez & Morell, S. en C., supra,* the union announced to the employees that it was waiving its $25.00 initiation fee, which, in fact, it never charged. Finding that the union had engaged in "a bold attempt to buy membership at a phonily reduced rate," the Court set aside the Board's bargaining order, since the union was not the freely designated bargaining representative. 328 F. 2d at 683.

See also the *Savair* dissent where Justice White refers to the view expressed in *NLRB* v. *Gorbea, Perez & Morell, S. en C.,* stating:

> "A different case might be put if the Union purported to remove a non-existent fee or artificially inflated fee so as to misrepresent the benefit tendered by its removal." 414 U.S. 283.

their concern about their financial obligations should the Union win.

In the absence of facts concerning these matters, it was not possible for the Fifth Circuit or the Board properly to evaluate the impact of the waiver upon Petitioner's employees. Because this inquiry goes to the heart of the Board's function in supervising the conduct of parties in the election arena, the Fifth Circuit should be instructed to direct the Board to conduct an evidentiary hearing to receive evidence on these critical questions.

b. The Supreme Court, in relying upon factual determinations made at a hearing in *Savair*, recognized the appropriateness of such a proceeding in an analogous situation.

It is important to note that in reaching its decision in *Savair*, this Court had the benefit of an evidentiary hearing. A Board hearing examiner made findings, *inter alia*, as to the pressures brought to bear upon the eligible voters and as to their motivation in signing the authorization cards. The *Savair* Court, moreover, made extensive reference to the hearing examiner's report and relied upon the examiner's findings in reaching a decision. See, e.g., 414 U.S. at 272-74, n.4. Manifestly, where complex questions about the impact of economic inducements upon eligible voters exist, an evidentiary hearing, as in *Savair*, will provide a necessary forum for a proper resolution of such issues.

c. In addition to being improper under the decisions of this Court, the failure to grant a hearing was improper under the decisions of both the Board and the Fifth Circuit.

Section 102.69(f) of the Board's Rules and Regulations, Series 8, as amended, provides in pertinent part:

> "if it appears to the Board that . . . exceptions raise substantial and material factual issues, the Board may direct the Regional Director or other agents of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer." [13]

The Board has consistently interpreted this section as mandatory, rather than discretionary. For example, in *Allied Foods,* 189 NLRB 513 (1971), *enforced,* 456 F.2d 1286 (5th Cir. 1972) the Board stated:

> "[W]hen the moving party presents a prima facie showing of 'substantial and material issues' which warrant setting aside the election . . . he is *entitled* to an evidentiary hearing." 189 NLRB at 515. (emphasis added).

The Fifth Circuit Court of Appeals agrees that this rule is mandatory. In *Gulton Industries* v. *NLRB,* 469 F. 2d 1371 (5th Cir. 1972), it stated:

> "A hearing is *required* when the Company presents substantial and material factual issues." 469 F. 2d at 1374. (emphasis added).

Petitioner submits that the substantial and material factual issues surrounding the Union's waiver in the present case, mandate a full evidentiary hearing under both Board and Fifth Circuit law. Moreover, as noted, this

[13] 29 C.F.R. 102.69 (f) (1974).

Court has indicated its reluctance to sanction Board proceedings in which the parties have not been afforded ample opportunity to present their respective positions. *NLRB* v. *Indiana and Michigan Electric Co., supra.* Petitioner has diligently sought such an opportunity, but the Board and the Fifth Circuit have refused to grant a hearing despite the existence of material and substantial factual issues. Petitioner respectfully submits that this refusal constitutes an abuse of discretion, and it requests this Court to grant review of the Fifth Circuit decision.

4. *The decision below sanctions the outright purchase of votes in derogation of the salutary purposes of the Act.*

The Board's election process has been set up to ensure the unfettered exercise by employees of their Section 7 rights. The integrity of this process, as enforced by the Board and monitored by the Courts, is an essential element in our national labor policy to foster industrial harmony through the reasoned and peaceful resolution of labor disputes.

By sanctioning the outright purchase of votes in this case, the Fifth Circuit Court of Appeals has condoned union behavior in derogation of the salutary purposes of the Act. The Fifth Circuit has announced to this and other unions that it will not scrutinize union bribes to eligible voters so long as these undesirable inducements are in the form of fee waivers. Regardless of whether these waivers are normally assessed fees or "artificially inflated fees," this decision cannot help but encourage unions to bypass normal and proper methods of persuasion in favor of the more convincing vehicle of a direct economic inducement. A decision with such an inevitable consequence warrants review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Dated: January 27, 1976

APPENDIX A

(Opinion of the Court of Appeals in Case No. 74-4223 Dated October 15, 1975, Summary Calendar*)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Decided October 15, 1975

No. 74-4223

THRIFT DRUG,
A Division of J. C. Penney Company, Inc.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

WISDOM, BELL and CLARK,

Circuit Judges.

PER CURIAM:

In a representation election, a majority of the employees in a warehouse unit of Thrift Drug, a Division of J. C. Penney Company, Inc., voted to be represented by the Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO. The Company then filed the following

* Rule 18, 5 Cir. *see Isbell Enterprises, Inc.* v. *Citizens Casualty Company of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

objections with the Regional Director of the National Labor Relations Board: (1) the Union's pre-election offer to waive all employees' initiation fees and assessments constituted an unlawful inducement to employees (*NLRB* v. *Savair Mfg. Co.*, 1973, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed. 2d 495); (2) threats of physical violence so permeated the election atmosphere that the requisite laboratory conditions were destroyed; and (3) continual challenges of voters by a Board agent created confusion and chaos about the election.

After an investigation of the objections, during which both parties were afforded the opportunity to present evidence, the Regional Director found all three objections lacking in merit, and certified the Union. The company refused to bargain. The Regional Director then issued an unfair labor practice complaint against the Company, charging it with having violated Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. The National Labor Relations Board granted the General Counsel's motion for a summary judgment and ordered the Company to bargain with the Union. 215 NLRB No. 51 (1974). The Company petitions this Court to review and set aside that order, or, alternatively, to remand for a full hearing on the Company's objections. The NLRB cross-petitions for enforcement of its order.

[1] In *NLRB* v. *Con-Pac, Inc.*, 5 Cir. 1975, 509 F.2d 270, we held that the Board did not err in granting certification, because the unconditional nature of the union's waiver of initiation fees distinguished the case from *NLRB* v. *Savair Mfg. Co.*, in which the fee waiver was predicated upon the employee signing a union recognition slip before the election. Because the Union's waiver of about $350 of

fees for each employee in the present case was unconditional, we again do not find the Board in error.

[2] On the lack of hearing issue in *Con-Pac,* we stated:

> We need not determine whether circumstances might arise that, in conjunction with a waiver of fees and dues like that present here, would taint a certification election, or at least require a hearing by the Board or its Regional Director. In this case we hold that where . . . the Company's only allegation of extenuating circumstances or improper conduct by the Union is the waiver of fees and dues for all employees in the bargaining unit, it is not an abuse of discretion to dispense with a hearing.

509 F.2d at 272. We agree with the Regional Director that the disruption of the election alleged in objections (2) and (3) did not occur. There are, therefore, no additional "circumstances" as contemplated by the dictum in *Con-Pac.* The Company having offered no newly discovered or previously unavailable evidence, the Board properly refused to permit relitigation of issues previously decided in the representation proceeding.

We deny the Company's petition to remand for a full hearing by the Board. We grant enforcement of the Board's order.

APPENDIX B

(Judgment of the Court of Appeals for the Fifth Circuit in Case No. 74-4223 Entered November 6, 1975)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 74-4223

THRIFT DRUG, A Division of J. C. Penney Company, Inc.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JUDGMENT

Before:

WISDOM, BELL and CLARK,

Circuit Judges.

THIS CAUSE was submitted upon a petition filed by Thrift Drug, a Division of J. C. Penney Company, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on December 4, 1974, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court, having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case

appropriate for summary disposition without oral argument, on October 15, 1975, handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding by enforced, and that Thrift Drug, a Division of J. C. Penney Company, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: Nov 6 1975

APPENDIX C

(Decision and Order of the National Labor Relations Board in Case No. 215 NLRB No. 51, Decided December 4, 1974)

MFP

D-9248

215 NLRB No. 51 Pittsburgh, Pa.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 6-CA-7494

THRIFT DRUG, A DIVISION OF J. C. PENNEY, INC.

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, CONSTRUCTION, GENERAL LABORERS AND MATERIAL HANDLERS LOCAL UNION NO. 1058, AFL-CIO

DECISION AND ORDER

Upon a charge filed on May 15, 1974, by Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO, herein called the Union, and duly served on Thrift Drug, a Division of J. C. Penney Company, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director

for Region 6, issued a complaint on May 30, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 28, 1974, following a Board election in Case 6-RC-6452 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 29, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 1, 1974, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and asserting three affirmative defenses.

On July 1, 1974, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, submitting, in effect, that Respondent is attempting to relitigate issues previously determined by the Board in the

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[1] Official notice is taken of the record in the representation proceeding, Case 6—RC—6452, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

representation case, and moving that the Board (1) strike Respondent's affirmative defenses, (2) again find the unit determined in the representation case to be appropriate, (3) find true the allegations of the complaint that Respondent has admitted, and (4) issue an appropriate remedial order. Subsequently, on July 12, 1974, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, the import of which is discussed below.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Respondent bases its opposition to the Motion for Summary Judgment on the absence of a hearing on its objections to the election in the underlying representation case. In support of this contention, Respondent reasserts those objections, to wit: threats of physical violence so permeated the election atmosphere that the requisite laboratory conditions were destroyed; continual challenges of voters by a Board agent created confusion and chaos about the election; and the Union's offer to waive initiation fees constituted an unlawful financial inducement to employees under the Supreme Court ruling in *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). Basically, Respondent attempts to show that factual disputes surround these contentions which require a hearing to resolve.

Appendix C

Our review of the full representation case record indicates that we passed on the merits of Respondent's objections upon Respondent's request for review of the Regional Director's resolution thereof, and the *Savair*-based contention was raised in Respondent's motion for reconsideration of the Regional Director's disposition of that issue which we treated as a request for review. On that occasion, we found that Respondent had raised no substantial issues warranting review, and that the Union's offer to waive fees was proper and within Board precedent, even as modified by the Supreme Court's decision.[2] Respondent offers no newly discovered or previously unavailable evidence to give us cause to reconsider those rulings, hence, under well-settled principles prohibiting relitigation of previously litigated issues,[3] we shall not disturb those determinations.

With respect to Respondent's central contention that a hearing is required on the issues raised by its objections, a review of Respondent's contentions discloses that its disagreement is with the conclusions drawn by the Regional Director from the undisputed facts. On the basis of those same facts, we found that Respondent had not raised substantial issues warranting review. Implicit in such finding and specifically reiterated here is that Respondent has raised no substantial issues warranting a hearing. It is well settled that where the essential facts are not in dispute a hearing on objections is not required.[4]

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[2] See: *Irwindale Division, Lau Industries, a Division of Phillips Industries, Inc.*, 210 NLRB No. 42 (1974); *Con-Pac, Inc.*, 210 NLRB No. 70 (1974).

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] *N.L.R.B.* v. *Golden Beverage Co.*, 415 F.2d 26 (C.A. 5, 1969); *Amalgamated Clothing Workers of America* v. *N.L.R.B.*, 424 F.2d 818 (C.A.D.C., 1970); *United Steelworkers of America* v. *N.L.R.B.*, —— F.2d ——, 86 LRRM 2984 (C.A. 5, 1974).

Appendix C

There being no issues properly litigable in this proceeding,[5] and Respondent not having presented substantial issues warranting a hearing, the General Counsel's Motion for Summary Judgment is granted.[6]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Delaware corporation with its principal offices and its warehouse-distribution center located in Pittsburgh, Pennsylvania, is engaged in the retail sale of drugs, health and beauty aids, and related merchandise. During the past 12 months, Respondent has received gross income valued in excess of $500,000. During the same period, Respondent received goods and materials valued in

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[5] In its answer to the complaint, Respondent denies the appropriateness of the unit, the election results and certification of the Union, and the Union's request and its refusal to bargain. Respondent litigated the unit appropriateness in the representation case and accordingly may not relitigate it herein. *Cherokee Nitrogen Company*, 200 NLRB No. 89 (1972). Review of the record reveals an undisputed revised tally of ballots showing a vote in favor of the Union and the certification of the Union by the Regional Director. With regard to the request and refusal to bargain, attached to the Motion for Summary Judgment are letters of request by the Union dated April 8 and 17, 1974, and a letter of refusal from Respondent dated April 29, 1974. Respondent offers nothing to controvert the implications of this evidence. Accordingly, we deem the allegations concerning a request and refusal to bargain to be admitted and true. *The May Department Stores Company*, 186 NLRB 86 (1970); *Carl Simpson Buick, Inc.*, 161 NLRB 1389 (1966).

[6] In view of the result reached herein, we find it unnecessary to rule on the General Counsel's request that the Respondent's affirmative defenses be stricken.

excess of $50,000 at its Pittsburgh, Pennsylvania, warehouse-distribution center from points directly outside the Commonwealth of Pennsylvania for sale within the Commonwealth of Pennsylvania.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse employees, including inventory crew employees, schedulers, maintenance employees, the traffic supervisor, machine operators, shippers, receivers, return employees, warehouse inventory employees, accuracy control clerks, order fillers, stockers, cigarette tax machine operators, the janitor, the messenger and the burner, employed by the Employer at its Pittsburgh,

Appendix C

Pennsylvania, warehouse-distribution center, excluding office clerical employees, order processors, set-up crew managers and guards, professional employees and other supervisors as defined in the Act.

2. The certification

On September 7, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 6, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on March 28, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about April 8, 1974, and at all times thereafter, in particular by letter dated April 17, 1974, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 29, 1974, and continuing at all time thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since April 29, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such

refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Con-*

struction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Thrift Drug, a Division of J. C. Penney Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time warehouse employees, including inventory crew employees, schedulers, maintenance employees, the traffic supervisor, machine operators, shippers, receivers, return employees, warehouse inventory employees, accuracy control clerks, order fillers, stockers, cigarette tax machine operators, the janitor, the messenger and the burner, employed by the Employer at its Pittsburgh, Pennsylvania, warehouse-distribution center, excluding office clerical employees, order processors, set-up crew managers and guards, professional employees and other supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 28, 1974, the above-named labor organization has been and now is the certified and exclusive

representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 29, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Thrift Drug, a Division of J. C. Penney Company, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of em-

ployment with Laborers' International Union, of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time warehouse employees, including inventory crew employees, schedulers, maintenance employees, the traffic supervisor, machine operators, shippers, receivers, return employees, warehouse inventory employees, accuracy control clerks, order fillers, stockers, cigarette tax machine operators, the janitor, the messenger and the burner, employed by the Employer at its Pittsburgh, Pennsylvania, warehouse-distribution center, excluding office clerical employees, order processors, set-up crew managers and guards, professional employees and other supervisors as defined in the Act

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Pittsburgh, Pennsylvania, warehouse-distribution center copies of the attached notice marked

"Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. Dec 4 1974

.....

Edward B. Miller, Chairman

.....

John H. Fanning, Member

.....

John A. Penello, Member

(Seal) National Labor Relations Board

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX D

(Selected Excerpts From Text of National Labor Relations Act, as Amended)

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

APPENDIX E

(Copies of Letters Sent to the Eligible Voters by the Employer on August 10 and 16, 1973)

August 10, 1973

Dear Associate:

Before deciding how you will vote in the upcoming election, one of the important questions for you to consider is whether this union can really do anything for you. Do their promises really mean anything? What is this union really interested in, getting something for you or increasing its bank account? Are these outsiders interested in your welfare or your money? (The history of union economics shows that your *money* interests them, *not your welfare.*)

Local #1058 is a profit-making organization. Like all such organizations, unions are not in business to lose money. If their income from *YOU* in dues, assessments, fines and readmission fees is greater than their campaign expenses, the campaign will have been a good business investment. Monthly dues are presently $72.00 per year per member, in addition to a minimum of $208.00 per year assessments for full time associates. (With our history of working overtime, this amount will probably be higher.)

Let's look for a second at what the Union Constitution has to say about your financial obligations:

1. "Each member shall pay to his Laborers Union . . . initiation fees, dues, and other lawful fees and assessments." (Article III, Section 2)

2. "The monthly dues are due on the first day of the month and unless paid . . . the member shall . . . be suspended." (Article VIII, Section 5)

Appendix E

3. "Persons in arrears have no right to attend meetings nor any other rights." (Article VIII, Section 8)

4. "The readmission fee for persons who are suspended for non-payment of dues, assessments, or fines shall be the amount of such assessments or fines," in addition to pro-rated charges depending on the length of suspension. (Article VIII, Section 7)

As you can see, there are not only DUES, but also *FINES, READMISSION FEES, ASSESSMENTS* and other *CHARGES* for you to pay the Laborers union. Has the union mentioned these expenses to you? We intend to give the full facts about what you have to pay if you were a Laborers member so that you can carefully weigh whether this union is worth the cost to you.

Sincerely,

THRIFT DRUG COMPANY

/s/ ROBERT HANNAN
Robert Hannan
Director of Personnel

RH:mas

Appendix E

August 16, 1973

Dear Associate:

Attached is a bill for an unlimited amount of money. You don't owe this money now, but you could if you became a member of Local #1058.

This bill is a monthly obligation you could assume if you vote to place yourself under the control of the Laborers. Part of the bill is for the monthly dues you would have to pay. This obligation can increase at any time. Part of the bill is for an initiation fee that you could be required to pay when you join the union. Another section of the bill describes fines that could be levied against you by the union for failure to attend union meetings—or refusing to march in picket lines—or simply as "discipline" for not following union orders.

You could be assessed to support the Laborers "strike fund." Special assessments may also be levied against you to pay legal fees for union leaders, for union political purposes, or to bail out union members in future strikes all over the country or right here in Pittsburgh.

These are a few of the ways the union can take a large part of your paycheck. If the Laborers get in, you would receive a monthly bill from them for the rest of your working life.

Vote against the union, don't waste your money.

Sincerely,

THRIFT DRUG COMPANY

/s/ ROBERT HANNAN
Robert Hannan
Director of Personnel

RH:mas

Enclosure

Appendix E

STATEMENT

LOCAL 1058

LABORERS' INTERNATIONAL OF NORTH AMERICA

To: A THRIFT WAREHOUSE ASSOCIATE

FOR: UNION BANK ACCOUNT (no money back guarantee if we don't deliver on our promises)

		ANNUAL COST
DUES	$6.00/month	$ 72.00
INITIATION FEE	Up to $150	?
ASSESSMENTS	10¢ per hour	$208.00
FINES	?	?
STRIKE FUND ASSESSMENT	?	?
OTHER SPECIAL ASSESSMENTS	?	?
READMISSION FEE	Up to $150	?
PAY THIS AMOUNT	?	$280.00 + ?

These charges may be increased by union bosses at any time.

PAYMENT DUE AFTER JOINING
LOCAL 1058

APPENDIX F

(Copies of Letters Sent to the Eligible Voters on August 17 and 22, 1973, in Which Local 1058 Waived Fees and Assessments)

August 17, 1973

DEAR THRIFT EMPLOYEE:

This letter is to certify (in writing) that after LOCAL UNION No. 1058 wins the NLRB election and negotiates a contract for you, the only expense to you will be the normal six dollars a month dues. There will be no initiation fees, assessments or fines. Not one THRIFT Employee has paid a cent to LOCAL UNION No. 1058 up to now and we do not want anything until after you approve the negotiated contract. Only the employees at THRIFT can vote to approve or reject your contract, so you must be satisfied before you have to start paying Union dues. Contrary to what others may say, the Union is not interested in your money. The purpose of a Union is to help those who need it. We were requested to help THRIFT Employees, and we plan to do the best job possible.

You must realize that the employees determine what they want in their contract. The employees' negotiating committee sit in on all the negotiating sessions. Do you want your old Blue Cross and Blue Shield program back paid for the Company? You *can* get it through negotiations. Do you want to earn a decent, liveable wage by working only 40 hours a week? You *can* get it through negotiations. You won't get everything you want in the first negotiations, but *YOU WILL GET MUCH MORE THAN YOU HAVE NOW* and it will be guaranteed in writing.

Appendix F

The cost of belonging to a Union is not one percent as much as the cost of not belonging to one. The Company knows this only too well. That is why they are trying to con you into voting no on election day.

A meeting will be held on *Monday, August 20th at 7:00 P.M.* at the Local Union No. 1058 Union Hall, *#12 Eighth St., Pittsburgh, Pa.* for THRIFT Employees. Refreshments will follow. Plan to attend.

REMEMBER—you are the Union so *give yourself a vote* on election day!

Fraternally yours,

/s/ THOMAS PECORA
Thomas Pecora
Business Manager

/s/ JOSEPH LAQUATRA
Joseph Laquatra
President

Appendix F

August 22, 1973

DEAR THRIFT EMPLOYEE:

Since this is the first opportunity we have had to reach all the eligible voters through the mail, it is possible this is the first time you have received anything from us. If it is the first time, I ask that you read our letters and leaflets very carefully. We are not going to bombard you with a lot of smear propaganda, but we will be sending you some facts about unionism and what it can mean to you.

First, let me point out that the U. S. Federal Government representatives of the National Labor Relations Board will conduct the secret ballot election in the Model Store on *September 7, 1973* between the hours of 9:15 A.M. and 11:00 A.M. The ballots will be counted immediately after 11:00 A.M. to determine the winner.

When we are certified by the N.L.R.B. as your exclusive bargaining representative, it will mean a new type of life for you and your family. You will know exactly what your wages are going to be for a couple of years in advance. You will know exactly what your chances are for promotion to a higher paying job. You will have a voice in what your hours of work and your schedules are going to be. You can negotiate your old Blue Cross and Blue Shield Plans back, etc., etc., etc., etc. In short, you can start planning your future. You won't have to worry if your boss is going to give you that better job if he likes you. *YOUR SENIORITY WILL MEAN SOMETHING.*

I doubt if any of you come from a family that your father or grandfather didn't belong to a Union. Ask them what the Union did for the workers years ago. I'm not saying

that Unions should run the world. I'm saying that our system of government works best when both sides have their rights. Right now, the only rights you have as a Thrift Employee is to quit your job if you do not like what the Company gives you or does to you.

RECOGNITION, GOOD FAITH BARGAINING, CONTRACT GUARANTEES AND FULL TIME REPRESENTATION. That's what it's all about.

Your *only cost* to get the above is a six dollar monthly dues.

Enclosed is a copy of a letter we distributed at the warehouse on Friday, August 17, 1973 just in case you did not get one.

Fraternally yours,

/s/ THOMAS PECORA
Thomas Pecora
Business Manager

APPENDIX G

(Excerpt From Supplemental Decision, Order Directing Hearing on Challenges, and Notice of Hearing, Issued by the Regional Director on December 12, 1973)

The Employer contends that the Petitioner's waiver of an initiation fee, assessments or fines is a substantial departure from its established practice and, as such, an improper financial inducement to influence the employees to cast their vote for Petitioner.

It is well settled that a union's waiver of a financial obligation—such as initiation fees[4] and dues[5]—which could be avoided entirely by voting "NO" does not coerce employees into voting "YES." In these circumstances, and where, as here, Petitioner's waiver was extended to all employees and was not conditioned on their voting in favor of unionization, I find that such conduct did not impair the employees' freedom of choice in the election. I further note that the question of possible financial obligation to be incurred in the event the employees selected the Petitioner was a matter introduced by the Employer itself during the course of its pre-election campaign and that on four separate occasions the Employer availed itself of the opportunity to alert employees concerning the nature and scope of the financial obligation which might be incurred if the employees selected Petitioner in the election. In these circumstances, I am satisfied that the employees were provided with adequate information to enable them to evaluate for themselves the question of whether they might be subject to initiation fees, dues, assessments and fines if they

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[4] *Dit-Mco, Inc.*, 163 NLRB 1019.

[5] *EFCO Corporation*, 185 NLRB 220.

selected Petitioner to represent them.[6] Accordingly, I find Objection No. 2 to be lacking in merit and it is hereby overruled.

[6] See *Hollywood Ceramics Co., Inc.*, 140 NLRB 222.

APPENDIX H

(Telegram of February 12, 1974, Denying Employer's Request for Review and Motion for Reconsideration of the Regional Director's Supplemental Decision)

EMPLOYERS REQUEST FOR REVIEW OF REGL DIR SUPPLEMENTAL DECISION ORDER DIRECTING HEARING ON CHALLENGES AND NOTICE OF HEARING IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. IT IS NOTED THAT IN URGING REVERSAL OF THE RGL DIR FINDING THAT THE PETITIONERS WAIVER OF FEES WAS NOT OBJECTIONABLE CONDUCT THE EMPLOYER RELIES UPON THE RECENT SUPREME COURT CASE OF NLRB V SAVAIR CO 84 LRRM 2929. HOWEVER THE BOARD CONCLUDED THAT WAIVER OF FEES INVOLVED IN THE INSTANT CASE IS OF SUCH A NATURE THAT THE REQUEST FOR REVIEW OF THE REGL DIR RULING WITH RESPECT THERETO DOES NOT RAISE ANY SUBSTANTIAL QUESTION OF LAW UNDER EITHER EXISTING BOARD PRECEDENT OR UNDER THE MODIFICATIONS THEREOF WHICH WILL BE REQUIRED BY THE COURTS RULING IN THE ABOVE CITED CASE.

BY DIRECTION OF THE BOARD

APPENDIX I

(Excerpt From Employer's Brief to the Fifth Circuit in the Instant Matter)

B. The Board Erroneously Seeks To Limit Savair To Its Precise Facts.

1. *The Board has relied upon precedent rejected by the Supreme Court.*

In its telegram denying the Company's Request for Review and Motion for Reconsideration, the Board stated:

> "Employer's Request is hereby denied as it raises no substantial issues warranting review. It is noted that in urging reversal of the Regional Director's finding that the Petitioner's waiver of fees was not objectionable conduct, the Employer relies upon the recent Supreme Court case of *NLRB* v. *Savair Co.*, 84 LRRM 2929. However, the Board concluded that the waiver of fees involved in the instant case is of such a nature that the Request for Review of the Regional Director's ruling with respect thereto does not raise any substantial question of law under either existing Board precedent or under the modifications thereof which will be required by the Court's ruling in the above-cited case." (App. 625).

Similarly, in granting summary judgment in the present case, the Board expressly relied upon the Regional Director's Supplemental Decision, stating:

> "Our review of the full representation case record indicates that we passed on the merits of Respondent's objections upon Respondent's request for review of

the Regional Director's resolution thereof, and the *Savair*-based contention was raised in Respondent's motion for reconsideration of the Regional Director's disposition of that issue which we treated as a request for review. On that occasion, we found that Respondent had raised no substantial issues warranting review, and that the Union's offer to waive fees was proper and within Board precedent, even as modified by the Supreme Court's decision (citation omitted). Respondent offers no newly discovered or previously unavailable evidence to give us cause to reconsider these rulings. . . ." (App. 679).

The Board's naked statement that *Savair* required no "modifications" of the Regional Director's decision failed to reveal any careful consideration of the facts of this case in light of the Court's ruling. Rather, the tenor of both the telegram denying the Request for Review and the Decision granting summary judgment, establishes that the Board relied upon the reasoning of the Regional Director in his Supplemental Decision.

However, the Director's decision is expressly founded upon precedent rejected by the Supreme Court in *Savair*. Specifically, the Regional Director relied upon *DIT-MCO, supra,* in concluding that there was no merit to the Employer's objection concerning the waiver. He stated:

"It is well settled that a union's waiver of financial obligations such as initiation fees and dues—which could be avoided entirely by voting 'No'—does not coerce employees into voting 'Yes.' In these circumstances, and where, as here, Petitioner's waiver was extended to all employees and was not conditioned on their voting in favor of unionization, I find that such

conduct did not impair the employees' freedom of choice in the election." (App. 584). (citations omitted).[12]

In underscoring that employees can avoid the cost of financial obligations imposed by a union by voting "No," the Director ignored the real issue. *The question in light of Savair is not whether employees can avoid union obligations, but whether the offering of financial inducements to influence the employees to vote for the union interferes with the election to such a degree as to warrant it being set aside.*

It is, of course, not surprising that the Director failed to make the kind of analysis which *Savair* requires, since the *Savair* decision was issued five days after the Director's decision. But the Board has no such excuse. It was well aware of *Savair* when it chose to rely upon the Director's pre-*Savair* analysis. It did this knowing that the Supreme Court had just re-emphasized the right of employees to participate in an election free from union inducements

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[12] How closely the Director's analysis was based on DIT-MCO is evident in comparing the following language from that case:

"Initially, it is obvious that employees who have received or been promised free membership will not be required to pay an initiation fee, *whatever the outcome of the vote.* If the union wins the election, there is by postulate no obligation; and if the union loses, *there is still no obligation,* because compulsion to pay an initiation fee arises under the Act only when a union becomes the employees' representative and negotiates a valid union-security agreement. Thus, whatever kindly feeling toward the union may be generated by the cost-reduction offer, when consideration is given only to the question of initiation fees, it is completely illogical to characterize as improper inducement or coercion to vote 'Yes' a waiver of something that can be avoided simply by voting 'No.'" 163 NLRB at 1021-22. (emphasis in original).

offered to sway their vote. The Court had refused to defer to the Board's expertise on this issue, and, further, admonished the Board "to establish the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives." 414 U.S. at 276.

Despite this, the Board has refused to consider the impact of the initiation fee waiver on the eligible voters and has attempted to limit *Savair* to its precise facts. Petitioner respectfully submits that the Board is acknowledging only the most narrow holding of *Savair,* while at the same time ignoring the rationale behind the decision.

APPENDIX J

(Excerpts from Petitioner's letter of November 1, 1973, to National Labor Relations Board, Region 6)

Objection No. 3—Improper Financial Inducements

On or about August 17, 1973, the union distributed a handbill certifying that if it won the election, the employees of Thrift would not be obligated to pay an initiation fee or any assessments or fines. In addition, on August 22, 1973, the union again distributed this certification by mail to Thrift employees. These communications are attached hereto as Exhibit "A" and "B", respectively.

It is submitted that the waiver of initiation fees is an improper inducement to influence eligible voters to cast their votes for the union. Moreover, the Laborers charges its members an assessment of 10¢ per hour under its agreements with associations through the Western Pennsylvania area. Attached is a copy of the agreement of the Constructors Association of Western Pennsylvania (Exhibit "C"), under which all members not only pay union initiation fees, but they also pay an assessment of 10¢ per hour. See e.g., Page 14-L. It is obvious that the union's assurances that there would be no assessments or initiation fees was a substantial departure from its established practice and was a blatant attempt to make financial inducements to affect the outcome of the election. The cost of an initiation fee and a 10¢ per hour assessment involved substantial amounts of money, and a waiver clearly could interfere with the free choice of the voter.

In frank terms, the waiver of the initiation fee and the assessments was an attempt to bribe the employees to vote in favor of the union. As such, it is illegal and the election should be set aside.

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Appendix J

In light of the substantial evidence which was presented during the investigation, we request that a hearing on the Employer's objections be held. We believe that such a hearing would permit a fair opportunity to evaluate the objections and to issue a prompt determination of the serious allegations concerning the atmosphere in which the election was conducted.

Very truly yours,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
/s/ VICTOR SCHACHTER
Victor Schachter

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1063

THRIFT DRUG, A DIVISION OF J.C. PENNEY COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a-3a) is not yet officially reported. The decision and order of the National Labor Relations Board are reported at 215 NLRB No. 51 (Pet. App. 6a-17a).

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1975 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on January 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Union's unconditional offer to waive initiation and other fees did

not impede the employees' free choice in the representation election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 18a.

STATEMENT

Petitioner maintains corporate headquarters in Pittsburgh, Pennsylvania, and sells retail drugs, health and beauty aids, and related merchandise. On April 6, 1973, the Union[1] filed a petition to represent a unit of all the warehousemen working in the Company's Pittsburgh warehouse-distribution center. On September 7, 1973, the Board conducted a representation election, which the Union won.[2] The Company filed objections to the election, alleging, *inter alia*, that the Union's pre-election waiver of initiation fees, fines and assessments constituted an impermissible inducement to vote for the Union.[3]

The Board's investigation of this objection revealed that the Company first introduced the topic of fees, fines and assessments, claiming that the Union was only interested in money (Pet. App. 19a-22a). To demonstrate the expenses employees might incur from unionization, the Company distributed what it claimed would represent a Union bill, stating that the initiation fee

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[1]Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO.

[2]53 ballots were cast for the Union, 34 against it, and 16 ballots were challenged; since the challenges could not affect the results, they were not resolved (Pet. 5).

[3]The Company has abandoned its other objections here.

could be "[*u*]*p to* $150" (Pet. App. 22a) (emphasis supplied). In response to the Company's claim that the Union was only interested in extracting fees from employees, the Union distributed a letter stating:

> This letter is to certify (in writing) that after LOCAL UNION NO. 1058 wins the NLRB election and negotiates a contract for you, the only expense to you will be the normal six dollars a month dues. There will be no initiation fees, assessments or fines. [Pet. App. 23a.]

On these facts, the Board, affirming its Regional Director, found that the Union's waiver of initiation and other fees did not warrant setting aside the election (Pet. App. 27a-28a, 29a). The Union was certified, the Company refused to bargain, and the Board, finding that the refusal violated Section 8(a)(5) and (1) of the Act, entered a bargaining order (Pet. App. 6a-17a).

The court of appeals enforced the Board's order (Pet. App. 1a-3a).

ARGUMENT

1. In *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270, this Court held that a union impermissibly interfered with the free choice of employees in a representation election, by conditioning the waiver of initiation fees upon *pre-election* support of the union. At the same time, however, the Court made clear that the union's "legitimate interest" in overcoming the reluctance of employees otherwise sympathetic to the union "to pay out money before the union had done anything for them" could be preserved "by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election." *Id.* at 274, n. 4.

Here, the Union's offer to waive initiation and other fees was not limited to the pre-election period. Thus, the court of appeals correctly concluded that it was proper under the principles enunciated in *Savair*. Moreover, the court's decision is in accord with the decisions of other courts of appeals that have uniformly held that unconditional offers to waive initiation fees are not improper inducements under *Savair* and therefore do not impermissibly interfere with employee free choice in representation elections. See, *e.g.*, *National Labor Relations Board* v. *Wabash Transformer Corp.*, 509 F. 2d 647, 649-650 (C.A. 8), certiorari denied, No. 74-1381, October 6, 1975; *Altman Camera Co., Inc.* v. *National Labor Relations Board*, 511 F. 2d 319, 322 (C.A. 7); *National Labor Relations Board* v. *S & S Product Engineering Services, Inc.*, 513 F. 2d 1311, 1312-1313 (C.A. 6); *National Labor Relations Board* v. *Benner Glass Co.*, 514 F. 2d 641, 642 (C.A. 5), certiorari denied, No. 75-654, January 12, 1976; *National Labor Relations Board* v. *Stone & Thomas*, 502 F. 2d 957, 958 (C.A. 4); *National Labor Relations Board* v. *Dunkirk Motor Inn*, 524 F. 2d 663, 665 (C.A. 2).

Nor is a different conclusion called for because the waiver here may have encompassed a large sum of money (see Pet. 8-10). The rationale of *Savair* is that a waiver of initiation fees limited to the pre-election period is impermissible because it "allows the union to buy endorsements and paint a false portrait of employee support during its election campaign" (414 U.S. at 277). Nothing in this rationale suggests that the amount of the fee is a relevant consideration where, as here, the waiver is not limited to the pre-election period.

Petitioner's reliance (Pet. 11-12) upon *National Labor Relations Board* v. *Gilmore Industries, Inc.*, 341 F. 2d 240

(C.A. 6), is misplaced. That case was decided prior to this Court's decision in *Savair*. Moreover, contrary to petitioner's contention, the decision in *Gilmore* did not turn on the amount of the fee but on the conditional nature of the waiver. As a later decision by the Sixth Circuit made clear, "[t]he crucial question * * * is whether the Union's reduction of fees was made available to all employees in the unit for a reasonable time after the Union became entitled to recognition." *National Labor Relations Board* v. *Gafner Automotive & Machine Inc.*, 400 F. 2d 10, 13 (Phillips, C. J., concurring).

2. The court of appeals properly concluded (Pet. App. 2a-3a) that petitioner was not entitled to a hearing on its objections to the election, since no relevant fact was in dispute. Petitioner's suggestion now that a hearing was necessary to determine if the Union's waiver constituted a factual misrepresentation comes too late (Pet. 14). That contention was never raised before the Board, and thus, under Section 10(e) of the Act, 29 U.S.C. 160(e), it cannot be raised before this Court. *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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